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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89

Dear Ms. Dortch:

NCTA – The Internet and Television Association submits this letter in response to the Public Notice issued by the Wireline Competition Bureau on October 26, 2018 in the above-captioned proceeding.^{1/} The Public Notice seeks comment on the applicability of Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (“Section 889”)^{2/} to the issues raised in the Notice of Proposed Rulemaking in this docket and the programs the Commission oversees.^{3/}

Section 889(a)(1) prohibits agency heads from procuring or obtaining – or extending or renewing a contract to procure or obtain – “any equipment, system, or services that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.”^{4/} Of particular note for the purposes of the Commission’s rulemaking and Public Notice, “covered telecommunications equipment or

^{1/} See Public Notice, FCC, “Wireline Competition Bureau Seeks Comment on Section 889 of John S. McCain National Defense Authorization Act for Fiscal Year 2019, WC Docket No. 18-89, Oct. 26, 2018 (“Public Notice”).

^{2/} See John S. McCain National Defense Authorization Act for Fiscal Year 2019, 115th Cong., Pub. L. No. 115-232, 132 Stat. 1636 (2018) (“NDAA”).

^{3/} *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Notice of Proposed Rulemaking, WC Docket 18-89 (rel. Apr. 18, 2018). On June 1, 2018, NCTA submitted comments in response to the Commission’s NPRM, acknowledging the importance of the supply chain security issues sought to be addressed in the proceeding, urging a whole-of-government approach to addressing those issues, and flagging some key considerations that should be reflected in any rules adopted by the Commission. See Comments of NCTA – The Internet and Television Association, WC Docket No. 18-89 (filed June 1, 2018).

^{4/} NDAA, § 889(a)(1).

services” are expressly defined to include “telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation or any subsidiary or affiliate of such entities.”⁵ The effective date of this restriction is one year from enactment, August 13, 2019.^{6/} Section 889(a)(2) similarly bars agency heads from entering into a contract – or extending or renewing a contract – with an entity that uses any equipment, system, or service that uses Huawei/ZTE equipment or services “as a substantial or essential component of any system, or as critical technology as part of any system.”^{7/} Section 889(b) provides that the head of an executive agency may not obligate or expend loan or grant funds to procure or obtain, or enter into a contract to procure or obtain, covered telecommunications equipment.^{8/} The effective date of these contracting and grant award restrictions is two years from the date of enactment, August 13, 2020.^{9/}

Section 889 constitutes a Congressional directive regarding the manner in which Federal agencies should address security concerns associated with procurement – or use by agency contractors, service providers, and grant recipients – of equipment from Huawei, ZTE, and other delineated equipment providers. The provision represents the most recent and definitive legislative declaration of the circumstances in which agencies should refrain from procuring, contracting for services with, or awarding grant funds that subsidize the purchase of, equipment from Huawei/ZTE, and other delineated equipment providers. Accordingly, the scope, details, and timetables of any rules developed by the Commission in the above-captioned proceeding, should be coterminous with the requirements of Section 889.

Congress made clear that Section 889 was intended to apply to all Federal agencies.^{10/} Indeed, an earlier version of the provision reported by the Senate Armed Services Committee applied only to the Department of Defense, but that was revised to apply more broadly across the entire Federal government prior to final passage.^{11/} Likewise, last year’s NDAA restricted only the Department of Defense from procuring, or contracting for equipment and services with an

⁵ See *id.* § 889(f)(3)(A). “Covered telecommunications equipment or services” under the NDAA also includes (1) video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company or any subsidiary or affiliate of such entities; (3) telecommunications or video surveillance services provided by such entities or using such equipment; or (4) telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be owned, controlled by, or otherwise connected to, the government of a covered foreign country. *Id.* § 889(f)(3).

^{6/} *Id.* § 889(c).

^{7/} *Id.* § 889(a)(2).

^{8/} *Id.* § 889(b).

^{9/} *Id.* § 889(c).

^{10/} NDAA, § 889(a)-(b) (imposing procurement, contracting, and grant award restrictions on the “the head of an executive agency”).

^{11/} See S. 2987, Section 891(b), available at <https://www.armed-services.senate.gov/imo/media/doc/BILLS-115s2987pcs.pdf>. See also 164 Cong. Rec. S5538 (Floor Statement of Sen. Reed) (“In fact, we imposed ... a government-wide prohibition on the acquisition of ZTE and Huawei products going forward.”) (emphasis added).

entity using, Huawei/ZTE equipment as a substantial or essential component of any system, or as critical technology as part of any system.^{12/}

Given that the restrictions in Section 889 now apply government-wide, after similar constraints applied only to the Department of Defense last year, a cohesive, whole-of-government application will be critical to ensure that the security concerns animating enactment of that section are addressed in a consistent and uniform manner across the Federal government. Section 889 contains a number of terms whose interpretation will be critical to determining the scope and circumstances of the constraints imposed therein.^{13/} It would be counter-productive for each government agency to interpret these terms separately, since that would heighten the risk that protecting government networks from the security concerns addressed via Section 889 would vary from agency to agency.

Notably, the Department of Defense (DoD) already has initiated an “Early Engagement” opportunity for solicitation of input regarding implementation of provisions of the NDAA, including Section 889.^{14/} Companies and representatives of affected industries have begun to provide feedback focused on implementation of Section 889, including raising concerns regarding the meaning of various terms affecting the scope of the provision.^{15/} In addition, it was announced today that DoD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) initiated a rulemaking to amend the Federal Acquisition Regulation (FAR) to implement section 889.^{16/}

Given this activity, the Commission should consider deferring moving forward pending further coordination with, or clarification from, the Department of Defense – or some other arm

^{12/} National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1656, 131 Stat. 1283, 1762 (2017).

^{13/} Terms requiring additional guidance include, but are not limited to:

- An “entity that uses any equipment, system, or service that uses covered telecommunications equipment or service”
- Substantial or essential component of any system
- Critical technology as part of any system
- Telecommunications equipment that can route or redirect user data traffic
- Telecommunications equipment that can permit visibility into any user data or packets
- Circumstances under which government loan/grant support is reasonably necessary for affected entities to transition from covered equipment and services

^{14/} See *Early Engagement Opportunity: Implementation of National Defense Authorization Act for Fiscal Year 2019*, Defense Acquisition Regulation System, 83 Federal Register 42883 (Aug. 24, 2018), <https://www.acq.osd.mil/dpap/dars/index.html>.

^{15/} Thus far, the Telecommunications Industry Association, Security Industry Association, IT Alliance for Public Sector, Glenn Security Systems, and Secom HikVision, have submitted comments seeking clarification of the meaning various terms in Section 889. See *Early Inputs Regarding the NDAA for FY 2019*, Defense Acquisition Regulation System, https://www.acq.osd.mil/dpap/dars/early_inputs_FY2019.html.

^{16/} *Federal Acquisition Regulation Case 2018-017, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment*, 83 Federal Register 58110 (Nov. 16, 2018) (Noting proceeding initiated by DoD, GSA, and NASA to establish a FAR rule implementing Section 889, with an interim final rule expected in February, 2019 and an expected close of the comment period in April, 2019).

of the Administration^{17/} – regarding implementation of Section 889 in a consistent manner across the Federal government. There is ample time, since the prohibition against agencies’ contracting for services – or awarding grant funds for – using blacklisted equipment does not go into effect until August 2020.

With respect to the primary question raised in the Public Notice, NCTA agrees that a plain reading of Section 889 does suggest that it would restrict awarding Universal Service Fund (“USF”) support to purchase equipment and services from providers of “covered telecommunications equipment or services.” Section 889(b)(1) expressly restricts the award of “loan or grant funds” to obtain, or enter into a contract to obtain, telecommunications equipment and services from providers such as Huawei and ZTE.^{18/} Further, subsection (b)(2) manifests Congressional intent for this restriction to cover any type of federal executive agency “loan, grant, or subsidy program” administered by the Commission.^{19/} That provision expressly directs the Commission to prioritize funding and support in loan, grant or subsidy programs it administers to assist affected businesses, institutions, and organizations “as is reasonably necessary for those affected entities to transition from covered telecommunications equipment and services and to ensure that communications services to users and customers is sustained.”^{20/} Thus, Congress clearly envisioned that beneficiaries of USF support would be “affected entities” impacted by the restrictions on agency acquisition of – or grant or loan support for the purchase of – covered telecommunications equipment and services like Huawei and ZTE equipment.

Construing Section 889 to cover USF support programs not only accurately reflects the statutory text, it also will best effectuate a coordinated, whole-of-government approach to supply chain security. By enacting Section 889, Congress intended to establish a comprehensive solution that requires all agencies, including the Commission, to adhere to the standards and timeframes set forth in the NDAA, rather than have individual agencies developing independent – and potentially inconsistent – rules and implementation practices.

A coordinated approach across all Federal agencies subject to Section 889 based upon the scope, language, and timetables of that provision would most effectively effectuate Congressional intent by giving providers clear and consistent guidance regarding the manner in which entities, equipment, and services are covered by the constraints of that section, and the date by which such equipment must be removed for providers to remain eligible to contract with executive agencies.

^{17/} In its comments, NCTA recommended that the Commission coordinate its activities in this proceeding with the ongoing cybersecurity supply chain risk management initiatives at DHS and also suggested that the Commission consider taking the necessary steps to work with DHS on these matters under the auspices of the existing Protected Critical Infrastructure Information (PCII) program. NCTA Comments at 6-7, 10-12.

^{18/} NDAA, § 889(b)(1).

^{19/} *See id.* § 889(b)(2).

^{20/} *Id.*

Accordingly, as set forth above, the Commission should tailor any action it takes regarding use of its USF administrative authority to address supply chain issues to conform to the directives, limitations, and timeframes of Section 889 of the NDAA.

Sincerely,

/s/ Rick Chessen

NCTA – The Internet and Television Association